IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,511

RIGOBERTO SANCHEZ-VELASCO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

BRIEF OF APPELLEE

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(Restated)

THE TRIAL COURT PROPERLY DETERMINED THAT DEFENDANT WAS COMPETENT TO WAIVE HIS RIGHT TO COUNSEL, AND THAT HE DESIRED TO DO SO.

STATEMENT OF THE CASE AND FACTS

Defendant's pro-bono post-conviction counsel, Michael Bowen, brings this appeal from the trial court's order granting Defendant's request to represent himself. Counsel also seeks reversal of Defendant's subsequent dismissal of his Fla. R. Crim. P. 3.850 motion.

This court set forth the following facts regarding Defendant's crime and the trial proceedings in Sanchez-Velasco v. State, 570 So. 2d 908, 910 (Fla. 1990)(footnotes omitted):

> Rigoberto Sanchez-Velasco resided with Marta Molina in Hialeah on December 12, 1986. When Ms. Molina went to work that afternoon, she left her eleven-year-old daughter, Katixia (Kathy) Encenarro, in the care of Sanchez-Velasco, with instructions that the child was to go to a neighbor's apartment later that evening. During the evening, Kathy spoke to Ms. Molina by telephone, as did Sanchez-Velasco, and Ms. Molina learned that Kathy had stayed in her own apartment. Ms. Molina had locked both deadbolt locks on her door when she left for work that day. When she arrived home, she found only one of the deadbolts locked. She had found out earlier that day that Sanchez-Velasco had made a duplicate set of her keys without her permission and that he was unable to lock one of the deadbolts with his duplicate key. Ms. Molina's apartment was very neat when she returned home late that evening, and there were no signs that it had been searched or ransacked. However, Sanchez-Velasco was not in the living room where he

normally slept. When she went to Kathy's bedroom and pulled down her blanket, Ms. Molina found Kathy's dead body. Kathy's face was swollen, and she was naked and bleeding from her vagina. Missing from the apartment were Kathy's gold chains, her identification bracelet, and Ms. Molina's fur coat.

The medical examiner concluded that a T-shirt had been twisted around Kathy's neck and that scratches on her neck were consistent with neck chains having been caught up in the shirt. Also, the medical examiner determined that Kathy had been raped while she was alive and that strangulation was the cause of her death.

Hialeah police officers investigating the murder believed that Sanchez-Velasco was the last person to see Kathy alive, and they considered him to be either a suspect or a material witness. They contacted several of Sanchez-Velasco's friends, whose names had been provided by Ms. Molina. One of them, Gilberto Estrada, complained that Sanchez-Velasco had stolen his stereo, and he set up a meeting with Sanchez-Velasco in Miami Beach and informed the police of the meeting. The Hialeah police officers went to Miami Beach in an unmarked police car. They arrested Sanchez-Velasco for grand theft of the stereo, which they believed to be valued at over $300, and they placed him in handcuffs. The officers then learned from Estrada that he had receipts totaling only $180; thus, the value of the stereo was less than $300. They called the office of the state attorney and were advised that they had no grounds for a grand theft arrest. The officers testified that they then removed the handcuffs and Sanchez-Velasco walked off and sat on some nearby boards next to the street.

According to the officers' testimony at trial, the following events then occurred. Approximately ten minutes later, a detective approached Sanchez-Velasco, identified himself, and asked if Sanchez-Velasco would be willing to talk to him about Kathy's murder. Sanchez-Velasco replied that he would talk to them, but only in Hialeah. Without assistance and without handcuffs, he got into the back seat of an unmarked Hialeah police car. During the drive to Hialeah, Sanchez-Velasco spontaneously stated that he wished to go to the Newport Hotel to retrieve some property and that the least he could do was give the jewelry back to Kathy's mother. At this point, Sanchez-Velasco had been told nothing concerning the facts of the case. He led them to the rear of the hotel near the beach, and he searched near a pile of wood without finding anything but a straw hat. The ride to Hialeah then resumed, and Sanchez-Velasco again broke the silence, remarking in Spanish that he would prefer to go to the electric chair right away rather than to "rot in jail."

Evidence presented at trial indicates that when they arrived at the Hialeah police station, the officers gave proper Miranda warnings to Sanchez-Velasco before discussing the case and that he declined attorney representation and waived his rights. According to Sanchez-Velasco's statements to the police, on the night of the murder he slept from the time of Ms. Molina's departure for work until 7 or 8 p.m., when he was awakened by the sound of Kathy on the phone with her sister. Later, he reheated some food for Kathy, which she ate. She then asked Sanchez-Velasco if he still loved Maria (his former girlfriend), and he responded by grabbing Kathy by the neck with both hands. She fell on the bed, and he pulled her T-shirt up around her neck, twisting it like a

tourniquet. Kathy fell to the floor, so he stood on the bed and used the twisted T-shirt to lift her back onto it. She did not make any noise, and he believed she was dead. He then removed her clothes, then his own, and he raped her. Sanchez-Velasco then took Kathy's jewelry and other property, called a taxi, and left around midnight after covering Kathy's body with a blanket.

At a hearing on a motion to suppress the above statements, the trial judge found that: (1) the statements were all voluntarily made; (2) appellant had voluntarily entered the police car and had traveled to the Hialeah police station of his own volition; and (3) probable cause existed to arrest Sanchez-Velasco for grand theft and for murder. In making the determination that Sanchez-Velasco had voluntarily entered the vehicle, the trial judge also considered Sanchez-Velasco's statements that he had considered turning himself in to the police and that he had also contemplated suicide.

Evidence at trial also established that Sanchez-Velasco had arrived at a hotel by taxi around 12:30 to 12:45 a.m. on December 13, 1986. He asked the night clerk if he was interested in purchasing a white fur coat or one of two neck chains. At trial, the night clerk identified one of the chains that Sanchez-Velasco had offered to sell him. That chain had previously been identified as one of those taken from Kathy the night of the murder.

Blood samples were taken from both Kathy and Sanchez-Velasco. His blood sample revealed that he has blood type "A" and a "PGN" of 1-2-. "A" antigens found in Sanchez-Velasco's saliva established that he is a secreter. Kathy's blood standard indicated

that she had blood type "O" and a "PGN" of 1+2+. An expert testified that Kathy would not naturally have "A" antigens in her body fluids. However, analysis of vaginal and cervical swabs revealed the presence of sperm, "A" antigens, and other enzymes consistent with someone with blood type "A" having had sex with the child. In addition, sperm consistent with appellant's blood type was also found on the sheets on Kathy's bed. Also examined from the crime scene were hair and fiber samples. One of the hairs submitted was from a Caucasian and was coated with a substance which tested positive as blood. The hair was consistent with the defendant's pubic hair standards. Finally, appellant's fingerprints were found on the dresser in Kathy's room.

Prior to trial, Sanchez-Velasco was examined for competency at the time of the offense and competency to stand trial. He was found competent in both instances. At the trial, Sanchez-Velasco interrupted the proceedings during the testimony of one of the police officers, exclaiming that the officer was lying. Defense counsel moved for a mistrial and for examination of the competence of the appellant. The examination determined that the appellant was competent. The trial court denied the motion for mistrial and found that he was competent to proceed. Sanchez-Velasco chose not to testify during the guilt phase of the trial, and he put on no other evidence. The jury found Sanchez-Velasco guilty of first-degree murder, sexual battery of a victim under twelve years of age, and theft as a lesser included offense of grand theft. He was found not guilty of burglary.

During the penalty phase, the state again presented the medical examiner, who testified extensively concerning the pain that Kathy

endured from both the rape and the strangulation. The defense presented a mental health expert who testified that Sanchez-Velasco was suffering from an emotional disturbance, though he was legally sane, and that the crime was "an impulsive, violent outburst of a person tainted with some disorder." The psychologist also testified that Sanchez-Velasco had been hospitalized in Cuba, but there was no indication that he had received psychiatric treatment. Sanchez-Velasco told the psychologist that he had no problems with drugs or alcohol.

Against the wishes of his attorney, Sanchez-Velasco made a statement to the jury on his own behalf. During his statement, Sanchez-Velasco apologized for his outburst on August 12; stated that he previously had been convicted of three minor offenses; claimed to have had numerous relationships with women who had children, similar to the relationship he had with Marta; claimed to love children; stated that the officers forced him to accompany them from Miami Beach to Hialeah; stated that the detectives lied when they said he did not demand his rights; denied being the person who made the tape-recorded confession; claimed to have been beaten into the confession; denied ever seeing Marta's coat; asserted that a man of his age could not have inflicted the vaginal lacerations about which the medical examiner had testified; and stated that he was neither under the influence of extreme emotional or mental disturbance at the time of the crime nor mentally ill or unable to appreciate the criminality of his conduct. At the conclusion of the penalty phase, the jury recommended the death penalty by an eight-to-four vote.

Additional mental health testimony was presented to the trial judge before

sentencing. The defense psychologist stated she was unable to reach firm conclusions concerning Sanchez-Velasco's mental state. She believed that Sanchez-Velasco was not suffering from organic brain damage, but she thought he might be out of touch with reality and that he possibly had a neuropsychological dysfunction. In addition, the psychologist discussed his refusal to serve with the Cuban military in Angola and his resulting hospitalization, as well as his relationships with and aggression towards women. She could not be sure if Sanchez-Velasco was operating under a mental or emotional disturbance at the time of the crime, but she conceded that she did not address his competency at that time or his ability to appreciate the criminality of his conduct. She concluded, however, that he was competent at the time when she interviewed him.

The trial court found two aggravating circumstances. It determined that the capital felony was especially heinous, atrocious, or cruel and explained:

> The medical examiner, Dr. Alvarez, testified that the child was alive for at least three minutes after the Defendant began to choke and rape her; that in addition to the shock of having a trusted adult choking her and raping her she suffered panic of not being able to breathe. The medical examiner further testified that the victim suffered a 5-6 centimeter laceration or tearing to the opening of the vagina and a 4-5 centimeter laceration at the back of the vagina; that the injury was likely to cause extreme pain before the child died. The injury was consistent with the forcible

> rape of a child of eleven by a grown man.
>
> The trial court found as the second aggravating circumstance that the capital felony was committed while the defendant was engaged in the commission of a sexual battery. With regard to the mitigating circumstances, the trial court stated that it "could find no evidence of any mitigating circumstances either statutory or nonstatutory." In making this determination, the trial judge explained why he did not find an extreme mental or emotional condition as a mitigating circumstance and expressly rejected the expert testimony of the two defense witnesses.

On appeal, Defendant raised six issues.[1] This court found all of Defendant's claims to be without merit. Sanchez-Velasco, 570 So. 2d at 916.

Defendant sought certiorari review, which was denied on May

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[1] Defendant raised three points concerning the guilt phase of the trial, contending that the trial court erred in (1) denying the motion to suppress his confession; (2) permitting all jurors to be excused who expressed opposition to the imposition of the death penalty; and (3) failing to grant a mistrial as a result of Defendant's outburst during the course of the trial. Sanchez-Velasco, 570 So. 2d at 913. He also asserted three claims of error in the penalty phase: that (1) the HAC aggravating circumstance was vague and consequently unconstitutional; (2) the trial court relied on a nonstatutory aggravating circumstance; and (3) the trial court failed to find as mitigating circumstances that Defendant was acting under extreme mental or emotional distress and that he was unable to appreciate the criminality of his conduct. Id. at 916.

13, 1991. Sanchez-Velasco v. Florida, 500 U.S. 929 (1991).[2]

On May 13, 1993, Defendant, through counsel,[3] and filed a Motion to Vacate Judgment of Conviction and Sentence. Defendant raised the following claims, verbatim:

> CLAIM I
>
> ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. SANCHEZ-VELASCO'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAS BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9 AND 17 OF THE FLORIDA CONSTITUTION. MR. SANCHEZ-VELASCO CANNOT PREPARE A COMPLETE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS, FOLLOW INVESTIGATIVE LEADS

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[2] Defendant had raised the following issues, verbatim:

> I
>
> WHETHER THE STATEMENTS OBTAINED FROM THE DEFENDANT SHOULD HAVE BEEN SUPPRESSED SINCE THEY FLOWED FROM THE ILLEGAL ARREST OF THE DEFENDANT WHO WAS TAKEN INTO CUSTODY ON LESS THAN PROBABLE CAUSE?
>
> II
>
> WHETHER THERE WAS A SUFFICIENT BREAK BETWEEN THE ILLEGAL ARREST OF THE DEFENDANT AND THE STATEMENTS MADE BY THE DEFENDANT?

(R 807).

[3] The only counsel of record listed on the motion was Mr. Bowen, the same attorney presently pursuing this appeal. (R. 27).

RESULTING FROM REVIEW OF THE MATERIALS AND AMEND THIS MOTION.

CLAIM II

RIGOBERTO SANCHEZ-VELASCO WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9 AND 16 OF THE FLORIDA CONSTITUTION.

CLAIM III

TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT A WEALTH OF COMPELLING MITIGATING EVIDENCE THAT WAS READILY DISCOVERABLE, TO PROVIDE HIS MENTAL HEALTH EXPERTS WITH ANY RECORDS OR BACKGROUND INFORMATION ON HIS CLIENT, TO ESTABLISH ANY OF THE STATUTORY MITIGATING CIRCUMSTANCES, TO OBJECT TO IMPERMISSIBLE PROSECUTORIAL ARGUMENT, AND COUNSEL'S CONCESSION OF AN AGGRAVATING CIRCUMSTANCE DEPRIVED MR. SANCHEZ-VELASCO OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

CLAIM IV

COUNSEL FAILED TO ENSURE THAT MR. SANCHEZ-VELASCO'S RIGHT TO TESTIFY WAS PROTECTED, AND ABANDONED HIS REPRESENTATION OF MR. SANCHEZ-VELASCO WHEN HE TESTIFIED AT THE PENALTY PHASE, IN VIOLATION OF MR. SANCHEZ-VELASCO'S RIGHT TO TESTIFY IN HIS OWN DEFENSE AND RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY ARTICLE I, §§ 9 , 16 AND 17 OF THE FLORIDA CONSTITUTION AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM V

RIGOBERTO SANCHEZ-VELASCO'S RIGHTS UNDER THE

FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT [sic] TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION WERE VIOLATED BECAUSE RIGOBERTO WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS WHILE LEGALLY INCOMPETENT.

CLAIM VI

MR. SANCHEZ-VELASCO, WHO SUFFERS FROM ORGANIC BRAIN DAMAGE AND OTHER PSYCHIATRIC DISORDERS, WAS DENIED COMPETENT MENTAL HEALTH EXAMINATION AND COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE FOR INFORMATION NECESSARY FOR SUCH AN EXAMINATION, IN VIOLATION OF HIS RIGHTS UNDER ARTICLE I, §§ 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM VII

THE JURY INSTRUCTIONS AT THE PENALTY PHASE WERE UNREASONABLY VAGUE AND CONFUSING; AS A RESULT, THE INSTRUCTIONS CREATED A PRESUMPTION IN FAVOR OF DEATH, AND THE JURORS' DISCRETION WAS NOT SUITABLY GUIDED, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9 AND 17 OF THE FLORIDA CONSTITUTION.

CLAIM VIII

THE STATE'S FAILURE TO TURN OVER EXCULPATORY INFORMATION IN ITS POSSESSION BEFORE TRIAL VIOLATED MR. SANCHEZ-VELASCO'S RIGHTS UNDER ARTICLE I, §§ 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, FLA. R. CRIM. P. 3.220, AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM IX

THE TRIAL COURT INSTRUCTED THE JURY TO CONSIDER, AND RELIED ON IN SENTENCING MR. SANCHEZ-VELASCO TO DEATH, TWO AGGRAVATING FACTORS BASED ON THE SAME ASPECT OF THE CASE

-- THE COMMISSION OF A SEXUAL BATTERY -- THAT MADE THE DEFENDANT DEATH QUALIFIED IN THE FIRST INSTANCE, THEREBY FAILING TO NARROW THE CLASS OF DEATH ELIGIBLE DEFENDANTS AND VIOLATING MR. SANCHEZ-VELASCO'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, § 17 OF THE FLORIDA CONSTITUTION.

CLAIM X

THE PENALTY PHASE JURY INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO MR. SANCHEZ-VELASCO TO PROVE THAT DEATH WAS INAPPROPRIATE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9, 16 AND 17 OF THE FLORIDA CONSTITUTION.

CLAIM XI

THE PROSECUTOR'S IMPROPER ARGUMENT DURING VOIR DIRE AND OPENING AND CLOSING ARGUMENTS AT THE GUILT AND PENALTY PHASES RENDERED RIGOBERTO SANCHEZ-VELASCO'S CONVICTION AND DEATH SENTENCE UNRELIABLE IN VIOLATION OF HIS RIGHTS UNDER ARTICLE I, §§ 9 AND 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XII

THE TRIAL COURT FAILED TO FIND MITIGATING EVIDENCE OFFERED BY MR. SANCHEZ-VELASCO, DESPITE THE COURT'S ACKNOWLEDGMENT THAT SUCH MITIGATION DID INDEED EXIST IN THIS CASE, THEREBY DEPRIVING HIM OF HIS RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION, IN VIOLATION OF ARTICLE I, §§ 9 AND 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XIII

THE STATE'S FAILURE TO NOTIFY MR. SANCHEZ-VELASCO OF HIS RIGHT TO INFORM THE CUBAN CONSULATE OF HIS ARREST, AS REQUIRED BY

INTERNATIONAL TREATY, VIOLATED MR. SANCHEZ-VELASCO'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9 AND 16 OF THE FLORIDA CONSTITUTION.

CLAIM XIV

EVIDENCE OF STATEMENTS ALLEGEDLY MADE BY MR. SANCHEZ-VELASCO TO HIALEAH POLICE WERE ERRONEOUSLY ADMITTED INTO EVIDENCE, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, § 9 OF THE FLORIDA CONSTITUTION.

CLAIM XV

MR. SANCHEZ-VELASCO'S POST-CONVICTION COUNSEL HAS BEEN DENIED THE COMPLETE RECORD, THEREBY DEPRIVING MR. SANCHEZ-VELASCO OF THE OPPORTUNITY TO ADEQUATELY AND FULLY DEMONSTRATE THE ERRORS MADE IN EARLIER PROCEEDINGS, IN VIOLATION OF ARTICLE I, §§ 2, 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM XVI

THE CUMULATIVE IMPACT OF JUDICIAL ERROR DENIED RIGOBERTO SANCHEZ-VELASCO OF [sic] HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9, 16 AND 17 OF THE FLORIDA CONSTITUTION.

(R. 34, 42, 54, 158, 165, 172, 182, 191, 196, 210, 216, 231, 239, 266, 275, 280).

On March 31, 1994, and again on April 28, 1994, Defendant wrote to the Governor, requesting that no further appeals be

undertaken on his behalf. (State's Appendices A and B).[4] The Governor responded on April 28, 1994, by forwarding the letter to Circuit Judge Thomas Wilson. (State's Appendix C). On May 6, 1994, Defendant's motion to have the cause transferred to the original trial judge was denied by Judge Wilson. (R. 760). Judge Wilson thereafter had three experts appointed to examine Defendant for competency, and set the matter for hearing on May 19, 1994. (R. 13). On that date, Defendant's brother, Fernando Sanchez, through Mr. Bowen, filed a petition in this court "as next friend" seeking to stay the proceedings "and all further proceedings which will expedite his execution." (State's Appendix D, at 6-7).[5] The Court denied the petition on May 20, 1994. (State's Appendix E). On May 23, 1994, Defendant withdrew the initial request to waive post-conviction proceedings. (R. 763).

On June 6, 1994, Judge Wilson recused himself and Judge Leonard Glick was assigned the case. (R. 13). On June 22, 1994,

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[4] The State has contemporaneously moved to supplement the record with the materials contained in Appendices A-C & G.

[5] Appendix D consists of the Petition filed by Fernando Sanchez in Sanchez v. Wilson, Florida Supreme Court case number 83,703. Appendix E consists of this court's order denying relief. The State would ask the Court to take judicial notice of its files in Sanchez v. Wilson.

Defendant moved to disqualify Judge Glick, which was denied as legally insufficient. (R. 764).

On June 20, 1995, Defendant again wrote to the Governor, seeking to waive his post-conviction proceedings. (R. 776). On August 23, 1995, the State moved to have Defendant transported to Dade County to conduct a colloquy on the issue. (R. 775). At a hearing on October 3, 1995, the trial court granted that motion. (1995 T. 4).[6] On October 16, 1995, Defendant's counsel filed a petition for extraordinary relief in this court, seeking to prevent him from being colloquied regarding his letter to the Governor. (State's Appendix F).[7] The petition was denied. Sanchez-Velasco v. Glick, 666 So. 2d 144 (Fla. 1995).

On October 17, 1995, Judge Glick, upon learning that this court had declined to stay the proceedings, went forward with the colloquy of Defendant. (1995 T. 5, 9). The dissolution of VLRC,

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[6] For reasons unknown, the proceedings during 1995 and those during 1996 are separately paginated in the transcript. The transcript references will therefore be to "[year] T. ___."

[7] Appendix F consists of the Petition filed by Defendant in Sanchez-Velasco v. Glick, Florida Supreme Court case number 86,645. The State would ask the Court to take judicial notice of its files in that case.

and the question of the continued representation of Defendant by Ms. Greenberg and Ms. Jacobs, as well as Mr. Bowen, was discussed. Ms. Greenberg and Ms. Jacobs, former VLRC employees, were uncertain whether they could continue to represent Defendant.[8] (1995 T. 6). Mr. Bowen indicated that regardless of the continued participation of the former VLRC attorneys in the case, he and his partners at Foley and Lardner in Milwaukee were prepared to continue to represent Defendant pro bono. (1995 T. 8). The court concluded that the issues presented were whether Defendant actually wrote the letter to the Governor, and whether Defendant wished in good faith to waive further proceedings. (1995 T. 10). The court then proceeded to colloquy Defendant.

In his letter to the Governor, Defendant complained that when he was brought to Miami after his first letter, his attorneys "surrounded him" with his entire family "young and old," who begged him to change his mind about giving up his appeals, which he did. (1995 T. 12). Defendant stated that he had written the letter himself. The court then asked Defendant if it was truly his intention to give up his appeals. Defendant expressed a desire to

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[8] Both attorneys had ceased to work for VLRC on September 30, 1995. (State's Appendix F, at 5).

make a statement. The court responded that Defendant would be permitted to say whatever he wished after he answered the question. (1995 T. 14). Defendant replied that he had already said that he wrote the letter, and that it was in his handwriting. He further stated that he meant what he said in the letter. He declined to state whether he felt that way at the time of the hearing until he had the "right to explain [him]self." The court assured Defendant that he would have the opportunity to explain himself as soon as he answered the question yes or no. (1995 T. 15). After Defendant repeatedly declined to respond to the question, the trial court concluded that Defendant was not "sincere" in his desire to waive his post-conviction appeals, and ordered the State to file a response to the 3.850 motion by November 17, 1995.[9] (1995 T. 16-20, 22).

On October 26, 1995, Defendant again moved to disqualify Judge Glick. (R. 786). On December 6, 1995, Judge Glick recused himself. (R. 842). Judge Victoria Platzer was assigned to the case.

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[9] Ms. Jacobs noted that they had no plans to amend the motion. (1995 T. 22). She further stated that they did not have any outstanding public records requests. (1995 T. 23).

On November 17, 1995, the State filed its response, asserting that Defendant's claims should be summarily denied as improper for post-conviction relief, procedurally barred, and/or refuted by the record. (R. 799-837). On February 23, 1996, Defendant filed a reply. (R. 845-77). A hearing was held on August 29, 1996, and on October 31, 1996, nunc pro tunc to the hearing date, the trial court entered orders granting an evidentiary hearing as to Claims III and V and summarily denying the remaining claims, attaching extensive record excerpts in support of the denial.[10] (R. 891-1549, 1552).

On September 24, 1996, Ms. Greenberg and Ms. Jacobs moved to withdraw as counsel, noting that Mr. Bowen would be continuing his representation of Defendant. (R. 884-85). The motion was granted on September 27, 1996. (R. 887).

On October 24, 1996, a hearing was held before Judge Platzer. Defendant immediately asserted that he was dissatisfied with Mr.

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[10] Although the caption of the order denying Claims I, II, IV and VI-XVI indicates that the court denied all claims except III and IV, the body of that order and the order granting the evidentiary hearing make clear that it was Claims III and V which were not denied.

Bowen. (1996 T. 3). Defendant complained that he had never informed him anything about the case, and had only visited him once. Mr. Bowen responded that he had only seen Defendant once because after the initial contact, Ms. Greenberg or Ms. Jacobs, who lived in Florida handled contact with Defendant. (1996 T. 4). The court required Mr. Bowen to state what he had done on Defendant's case. (1996 T. 5). He responded that he had conducted an initial interview of Defendant; he had participated in the drafting of the petition for post-conviction relief; he had appeared personally and telephonically at numerous court hearings; he prepared the "brief" for the court on the issue of the disclosure of trial counsel's files; he had contacted various potential witnesses; and he had arranged for one of his associates, who was also a medical doctor, to assist him at the evidentiary hearing. (1996 T. 6-7). This case was his first involving the death penalty. He had, however, discussed the post-conviction procedures with Ms. Jacobs and Ms. Greenberg. He was generally familiar with the applicable case law. (1996 T. 7). He felt that his knowledge was sufficient to handle the case, noting that he felt that the issues presented were primarily factual as opposed to legal. He felt he could provide competent counsel to Defendant. (1996 T. 8).

Defendant objected (in an intelligent and coherent fashion) that he was concerned that Mr. Bowen was primarily a civil attorney, and that he was not admitted to practice in the State of Florida, that Mr. Bowen had never informed him of those facts, and had that he had not discussed the case with him. (1996 T. 9). Defendant noted that VLRC, which had been representing him, had been closed by the federal government. Defendant again expressed concern that Mr. Bowen did not have capital experience, was a civil attorney, and was not admitted in the State of Florida, and had not spoken with the witnesses. Defendant also noted that Wisconsin did not have the death penalty, and again expressed concern as to Mr. Bowen's competence. (1996 T. 10). Defendant then requested that Mr. Bowen be discharged, and that Defendant be permitted to waive his right to appeal. (1996 T. 11).

The court then concluded that Defendant was presenting two issues: (1) Mr. Bowen's competence; and (2) the withdrawal of the R. 3.850 motion. The court determined to address the former first. (1996 T. 11). In response to Defendant's concerns, Mr. Bowen stated that he directly participated in the drafting of the petition, and discussed the tactical issues relating to the petition with the VLRC counsel; that he had attended numerous

hearings, in person and telephonically, and had addressed substantive issues at those hearings, (1996 T. 14); and that he had argued that Defendant was not mentally competent when Defendant sought to waive his appeals on a previous occasion.[11] Mr. Bowen did note that up until the time of the hearing, his role had been secondary, partly because of the greater experience of the VLRC attorneys, and because of their greater proximity. He rejected, however, Defendant's contention that he had not worked on the case. Likewise, he had not communicated with Defendant because the VLRC attorneys performed that function also. (1996 T. 15). Mr. Bowen also noted that he had been admitted pro hac vice for the purposes of representing Defendant. He conceded that he was not personally acquainted with Defendant's family or the witnesses, but noted that he spoken with a few witnesses they expected to call at the evidentiary hearing. He had anticipated contacting the other witnesses prior to the hearing, but that had been cut short when Defendant indicated that he wished to remove him from the case. (1996 T. 16). He also noted that although he practiced primarily civil litigation, he felt very comfortable with examining witnesses

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[11] This was another point on which Defendant disagreed with Mr. Bowen, asserting that he had been evaluated by the State of Florida, and was "100 percent competent." (1996 T. 13).

and courtroom procedure. (1996 T. 17). Finally, as to Defendant's concerns about why he would accept a case for free, he explained that it was based upon his personal opposition to the death penalty, combined with what he felt was a professional obligation to volunteer. (1996 T. 18).

At the conclusion, the trial court concluded that it did not feel that Mr. Bowen was rendering ineffective assistance, and declined to appoint other counsel. (1996 T. 18). The court then advised Defendant that he could either represent himself, which the court did not recommend, or he could go forward with Mr. Bowen. (1996 T. 18). The court instructed Defendant to retire to the jury room to discuss the issue with Mr. Bowen. Defendant declined that opportunity:

> THE DEFENDANT: I appreciate your honor's intentions, but the reason I'm here right now is because I don't need an attorney. I don't want him, nor do I want any other attorney, nor have I asked the Court for another attorney. I'm capable -- I was evaluated by the Court, by criminal court, I'm competent. A couple of months ago I was evaluated by Brevard County.
>
> MS. GAY: He was evaluated by Dr, Greer.
>
> THE DEFENDANT: The doctors, they testified in court that I was competent to the motion that I was filing. It was a similar

case to get rid of the attorney.

(1996 T. 19-20). The prosecutor explained that that evaluation had occurred approximately a year earlier. (1996 T. 20). The judge observed that Defendant appeared competent and intelligent to her. The court nevertheless wanted to have Defendant evaluated again before it would grant Defendant's motion to represent himself and waive his appeals. (1996 T. 21). Defendant felt that another evaluation would be a waste of time:

> THE DEFENDANT: For the last ten years I've been evaluated by the State of Florida, and correction department has hundreds of psychologist and psychiatrist, and I'm being watched 24 hours a day, and they have my file and they say I'm 100 percent that I'm mentally competent. I'm fine. If you have any doubt about my competency, you can ask me whatever question you want. Or if that don't satisfy the law, then you have every right to ask for an emergency for psychiatrist to ask me the question in front of Your Honor, if you want, and then for you to legalize my Right to waive my appeal. And then you can report it to the Governor that I no longer have a pending appeal.

(1996 T. 22-23). The State then requested that the court conduct a Faretta[12] inquiry. (1996 T. 23). The court felt that it was necessary the Defendant be evaluated for competency first, and so ordered. (1996 T. 28).

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[12] Faretta v. California, 422 U.S. 806 (1975).

Defendant was evaluated by Dr. Sonia Ruiz, and the following day the court conducted a Faretta inquiry. (1996 T. 34). Dr. Ruiz issued a report in which she concluded that Defendant was competent to proceed. The court noted that it also found Defendant to be intelligent, and that he knew what was going on. Defendant was then sworn, and colloquied. (1996 T. 34). Defendant stated that he was 37 years old, and that he had had seventeen years of formal education in Cuba. (1996 T. 35). Thereafter, while still in Cuba, he worked designing and building cars. After coming to the United States, he worked for a relative in the construction field. (1996 T. 36). When asked if he understood what the consequences of the court granting his motion would be, Defendant replied that he would be "free in the hands of the Governor." (1996 T. 37). The court asked him to explain that statement and Defendant responded:

> THE DEFENDANT: Upon finishing the judicial process, I am free for the Governor to comply with his duty and his obligation to carry out my conviction.

(1996 T. 38). The court then asked if Defendant understood that if he prevailed on the penalty-phase claims on which the court had ordered an evidentiary hearing, that he would then be entitled to a new sentencing hearing. (1996 T. 38). Defendant replied that he understood that. Defendant also stated that the court was correct

in understanding that he wanted to withdraw the R. 3.850 motion. The court explained that if Defendant withdrew his motion, that he would then not have any right to appeal to the federal courts or to appeal to this court, and that his appeals as to this case would be over. Defendant stated that he understood. (1996 T. 39). Defendant also stated that he wished to have the attorneys leave him alone and have the right to die in peace. (1996 T. 40). Defendant was also informed that if he withdrew his motion he would not be permitted to reinstate it in the future. (1996 T. 41). Defendant stated that he understood that "perfectly," and that that was his desire. (1996 T. 42).

After extensive discussion of the issue among the attorneys and the court, the court noted that Defendant had also been examined by Dr. Greer in November 1995, and was found to be competent. Defendant was again asked what he wished to do, and Defendant stated that he wished to represent himself and withdraw his R. 3.850 motion, asserting that he was competent to make his own decisions. The court found that that was an unequivocal request to represent himself, that he understood the consequences of waiving the right to counsel, that he was competent to do so, and that he also understood the effect of withdrawing the post-

conviction motion, and of waiving any further right to appeal. It therefore granted his motion to discharge counsel and to dismiss the R. 3.850 motion. (1996 T. 56-57).

On October 31, 1996, the trial court entered a written order finding that Defendant's counsel was effective, and that Defendant was competent to waive counsel. The court therefore granted his motion to discharge counsel. The court also granted Defendant's motion to dismiss his Fla. R. Crim. P. 3.850 motion. (R. 1550-51).

This appeal followed.

SUMMARY OF THE ARGUMENT

Defendant's counsel asserts that the trial court erred in not conducting a competency hearing before determining whether Defendant desired to waive his collateral counsel and proceedings. However, by the time of the hearing nine experts had examined Defendant; none had found him incompetent. The trial court likewise found that Defendant appeared competent. As such no further competency proceedings were warranted.

The trial court nevertheless ordered Defendant evaluated a tenth time. The latest doctor also concluded that Defendant was competent. Counsel faults the trial court for not conducting an evidentiary hearing on the issue of competence, despite his failure to request one below. He likewise faults the trial court for not rejecting the ten experts for two which collateral counsel had hired and who opined that Defendant had not been competent at the time of trial. Even overlooking counsel's failure to bring these experts to the court's attention below, the bases of their opinions were neither well explicated nor supported by the overall record.

In any event, the trial court's finding that Defendant was competent is amply supported by the record and should be affirmed.

Likewise, the trial court's inquiry into Defendant's stated desire to waive counsel and further proceedings showed that Defendant fully understood the nature and consequences of his request. As such the trial court properly granted Defendant's requests to discharge counsel and to dismiss his post-conviction motion. Its orders should be affirmed.

ARGUMENT

THE TRIAL COURT PROPERLY DETERMINED THAT DEFENDANT WAS COMPETENT TO WAIVE HIS RIGHT TO COUNSEL, AND THAT HE DESIRED TO DO SO.

Mr. Bowen, Defendant's pro bono post-conviction attorney, (hereafter Counsel) attacks the trial court's granting of Defendant's motion to discharge him and Defendant's subsequent dismissal of his R. 3.850 motion. Counsel does not appear to fault the colloquy itself that preceded the granting of Defendant's motion. Rather, he asserts primarily that the trial court's determination of Defendant's competency was flawed. Counsel's claim is without merit.

When a capital defendant asserts a desire to forgo counsel and further appeals, the proper course is for the trial court to conduct a "Faretta-type inquiry," and if the defendant is found to understand the consequences of his waiver, and the waiver is knowing, intelligent and voluntary, to grant the request. Durocher v. Singletary, 623 So. 2d 482, 485 (Fla. 1993). If the hearing raises any questions in the trial court's mind, it may order a competency evaluation, and thereafter make the determination. Id. This is the precise procedure which was followed below. Counsel

faults the procedure as inadequate, however, on several grounds, none of which have merit.

Counsel's central premise -- that Defendant's competency was "legitimately in doubt," (B. 18), is flawed. The record clearly contradicts this assertion. Even before ordering Defendant examined, the court plainly did not perceive Defendant's competence to be in question, but rather ordered the examination in an abundance of caution:

> THE COURT: He appears very intelligent to me, at this point. He appears to be very competent. If he wants to discharge his attorney and withdraw his Rule Three --
>
> THE DEFENDANT: I have a right to by law.
>
> THE COURT: I believe he has a right to. The question is whether or not there is any question that he is not competent. I would assume, in light of the fact that Mr. Bowen wants to make sure that you do not go to the electric chair, I would only be comfortable to having you evaluated. And if you want me to do that, I will do that. They will do it on an emergency basis.

(1996 T. 21)(emphasis supplied).

Moreover, Counsel wholly ignores the presumption of competence which had attached to this case from the numerous previous findings

of competency. See, Hunter v. State, 660 So. 2d 244, 248 (Fla. 1995); Durocher, 623 So. 2d at 484. At the time of his trial Defendant was examined by no less that 8 experts,[13] none of whom was of the opinion that Defendant was incompetent. (D.A.R. 1692-96, 1793).

Although experts were appointed pre-trial to examine Defendant for competency, presumably they did not find Defendant to be incompetent, as no competency hearing was held at that time. Id. After Defendant's "outburst" during trial, Defendant was again examined. See, Sanchez-Velasco, 570 So. 2d at 911-12. A competency hearing was held, and Dr. Andres Jimenez, a psychiatrist who had been practicing for twelve years, testified that Defendant was competent. (D.A.R. 1909-20). Defendant specifically denied that he had ever been impaired at any time in his life by drugs, alcohol, or mental illness. (D.A.R. 1919). Dr. Anastasio Castiello, a psychiatrist with the Jackson Memorial Hospital

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[13] Drs. Jaslow, Mutter, Reichenberg, Burglass, Haber, Marina, Castiello, and Jimenez. (D.A.R. 41, 43, 44; D.A.R. 1692-96). (The term "D.A.R. ___" will be used to refer to the record on appeal, which included the transcript, in Defendant's direct appeal proceedings, Sanchez-Velasco v. State, No. 73,143. The State would request the Court to take judicial notice of its files in that case.)

forensic team, likewise concluded that Defendant was competent. (D.A.R. 2187-2200). The trial court thereupon concluded that Defendant was competent to proceed. (D.A.R. 2201). The issue was not raised on direct appeal. Sanchez-Velasco.

At the penalty-phase proceedings, Defendant's mental status was again raised as proffered mitigation. Defendant called Dr. Leonard Haber, a psychologist. (D.A.R. 2616). Dr. Haber concluded that Defendant met the test for criminal responsibility. (D.A.R. 2684). Haber further felt that while Defendant might have suffered from some disturbance at the time of the murder, he clearly did not suffer from any major psychological disorder. (D.A.R. 2663, 2665, 2686). Dr. Dorita Marina, PhD, testified during the sentencing hearing before the court. (D.A.R. 2814). Her conclusions were, by her own admission inconclusive; the best she could offer was that Defendant may have been under the influence of some emotional disturbance at the time of the crime. (D.A.R. 2864). She did opine, however, that at the time that she saw Defendant, he was competent. (D.A.R. 2858). In its sentencing order, the trial court rejected Defendant's proposed mental health mitigation, noting that Defendant appeared "to be intelligent, well educated and articulate." (D.A.R. 250). Defendant's challenge to those

findings was rejected on appeal. Sanchez-Velasco, 570 So. 2d at 916.

Further, on November 25, 1995, eleven months before the court held the Durocher hearing, Defendant was examined in his Bradford County case[14] by psychiatrist Richard Greer, Chief of the Division of Forensic Psychiatry at the University of Florida's Shands Hospital, who specifically found Defendant to be competent. (State's Appendix G at 3). Dr. Greer had reviewed Defendant's prison records, and interviewed Defendant. Id. Dr. Greer felt that Defendant understood the charges he was facing, was aware of the potential penalties, understood the nature of the process, and the respective roles of the prosecutors, defense attorneys, and judge. (State's Appendix G at 1-2). He did feel that Defendant was not motivated to assist his counsel, but that was because Defendant felt that life in prison would be worse than the death penalty. (State's Appendix G at 2). Defendant informed Dr. Greer that he was confined to a psychiatric hospital in Cuba between the ages of 15 and 18; however, he was not "crazy" at the time, but

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[14] Defendant is facing charges there in Florida Eighth Judicial Circuit case no. 95-215-CFB for the death-row murder of Charlie Street.

feigned illness to avoid military service.[15] Id. Defendant stated that alleged psychotic incidents recorded in the State Prison records were the result of him "acting crazy." Id. Defendant's reported personal educational and work history were consistent with that reported to Judge Platzer at the Durocher hearing below. Id. Dr. Greer found Defendant to be pleasant and cooperative, and his affect to be normal. (State's Appendix G at 3). He had no thought process or content disorders, his cognition was intact and Defendant was alert and oriented. All frontal lobe functions as well as concentration and attention were normal. Id. Dr. Greer did not feel Defendant suffered from any major mental disorder. Id. Dr. Greer noted that Defendant stated that any past reports of bizarre behavior on his part were contrived by Defendant. Id. Finally, Dr. Greer thought that Defendant satisfied all the legal criteria for competency. (State's Appendix G at 3-4). The only qualification he placed on that conclusion was that Defendant was not motivated to help himself or his attorneys, but even then, Dr. Greer felt that Defendant understood the consequences of his actions. He had the capacity to assist in his own defense, but

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[15] Cf., the trial court's September 23, 1988, sentencing order: "There is some indication of some emotional disturbance for which he was hospitalized in Cuba but the episode may have been feigned to avoid military service in Angola." (D.A.R. 250).

simply chose not to. (State's Appendix G at 4). The trial court was advised of Greer's opinion before the Durocher hearing was held. (1996 T. 20).

In view of the foregoing, Defendant plainly arrived at the Durocher hearing with a presumption of competency. Hunter; Durocher; Rivers v. State, 458 So. 2d 762, 765 (Fla. 1984). Nothing which occurred below should have caused a reasonable jurist to question Defendant's competence. As such, no further inquiry into Defendant's competency was required. See, Durocher, 623 So. 2d at 485 (mandating a competency hearing only if a question arose in the judge's mind as to the defendant's competency); Drope v. Missouri, 420 U.S. 162, 180 (1975)(requiring inquiry only where circumstances create "sufficient doubt" as to defendant's competency).

In Drope, the Court presented three factors which should be considered in determining whether there was "sufficient doubt" as to the defendant's competency such that a hearing was required: (1) evidence of irrational behavior by the accused; (2) the accused's in-court demeanor; and (3) any prior medical opinion regarding the accused's competency to stand trial. Id. at 180.

Here the only evidence of irrational behavior cited by Counsel is the purported contradiction between Defendant's assertion that Counsel was not competent and his desire to terminate the proceedings. This alleged contradiction is not as irrational as Counsel would portray it to be. The hearing below was the result of Defendant's fourth request to forego further proceedings. At the time of his initial request, Defendant was returned to Dade County for the purpose of determining his wishes. By Defendant's own description, at that time his counsel arranged to have all his family members, "young and old," surround him and persuade him, through emotion and guilt, to withdraw his request to terminate his appeals. (1995 T. 12). At the time of the second hearing regarding Defendant's waiver of his appeals, the VLRC attorneys filed a petition in this court seeking to prevent the trial court from colloquying him on the issue, (State's Appendix F), and they and Counsel asserted that Defendant was not competent. (State's Appendix F at 10; 1996 T. 15). The latter action was a particular bone of contention Defendant had with Counsel's performance. (1996 T. 13). By the time of the hearing under review, the VLRC lawyers had withdrawn from representing Defendant due to their organization's demise. (R. 884-87). That left only Counsel representing Defendant.

With the VLRC attorneys gone, the only impediment to Defendant's carrying out his desire to terminate the appeals process was Counsel. Seeking to have Counsel discharged, on whatever grounds were available, was therefore a rational way to achieve his oft-stated goal of ending the post-conviction proceedings. By all accounts, Defendant is intelligent, if unschooled in the law. His complaints against Counsel were factually grounded, if ultimately legally unsound.[16] Defendant asserted that Counsel was unqualified because he was not admitted in the State of Florida, primarily practiced civil law, lacked capital case experience, and had had little contact with Defendant, the witnesses, or the Defendant's family. (1996 T. 3, 9-10). Tellingly, Defendant concluded his complaints concerning Counsel with the assertion that he wanted Counsel discharged and to waive his post-conviction rights. (1996 T. 11). Upon the court's suggestion that he consult with counsel prior to seeking to waive his appeals, Defendant again asserted that he did not want or need an attorney:

THE DEFENDANT: I appreciate your honor's

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[16] The trial court rejected, upon Counsel's responses, the claim that Counsel was not competent. The factual bases of Defendant's claim were not refuted, only the legal conclusions. (1996 T. 14-18).

> intentions, but the reason I'm here right now is because I don't need an attorney. I don't want him, nor do I want any other attorney, nor have I asked the Court for another attorney.

(1996 T. 19)(emphasis supplied). Later, during the Durocher colloquy, Defendant again asserted that he only wanted the attorneys to leave him alone and let him die in peace. (1996 T. 40).

Rather than the contradiction Counsel asserts, Defendant has consistently and repeatedly sought to waive his appeals. His attorneys have just as consistently and repeatedly sought to prevent that from happening. As such Defendant's attempt to get counsel removed on the pretext of incompetence was wholly consistent and reasonable. Likewise, Defendant's perception of Counsel, who has sought to thwart his wishes at every turn, as his "enemy" is hardly remarkable. See, Trawick v. State, 473 So. 2d 1235, 1239 (Fla. 1985)(neither ambivalence as to course desired by Defendant nor despondency and suicidal ideation gave rise to reasonable grounds to believe that defendant was incompetent; thus failure to conduct competency hearing not error; a fortiori, such evidence did not support contention that defendant was in fact incompetent); Agan v. State, 503 So. 2d 1254, 1256 (Fla.

1987)(rejecting argument similar to that presented by Counsel because it "would require a competency inquiry in virtually every case in which an accused person makes a decision perceived by others as being unwise"); Hernandez-Hernandez [sic] v. United States, 904 F.2d 758, 761 (1st Cir. 1990)(same); Medina v. Singletary, 59 F.3d 1095, 1107 (11th Cir 1995)(bizarre or irrational behavior cannot be equated with mental incompetence to proceed). Finally, to the extent Counsel is suggesting that Defendant's incompetency should be presumed from his desire to forego further appeals, that notion was squarely rejected in Durocher:

> The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of motive, suggests that preservation of one's own life at whatever cost is the summum bonum, a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

Durocher 623 So. 2d at 484 n.5 (quoting Lenhard v. Wolff, 443 U.S. 1306, 1312-13 (1979)(Rehnquist, J.)).

As for the second Drope criterion, there is no evidence that

Defendant's in-court demeanor has been anything but appropriate.[17] The final Drope factor, the prior medical opinions, strongly militate against Counsel's arguments. Nine medical and mental health doctors, most of whom have testified in numerous capital proceedings in this State, all found Defendant to be competent.

Moreover, the cases upon which Counsel relies, in which no competency evaluation was conducted, despite the issue of competency having been raised, have no relevance to the issue Counsel posits. For example, in Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991), habeas relief was granted where the defendant moved prior to arraignment for a mental examination pursuant to Arkansas statutory provisions. The three doctors who examined the defendant were unable to reach a consensus as to their conclusions, and recommended further testing. Id. at 927-28. The defendant subsequently, against the advice of counsel, withdrew the motion and proceeded to trial. Id. at 928. On the eve of trial, counsel again raised the issue of the defendant's competency. After merely asking the defendant how he felt about the competency issue, the

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[17] Defendant's only inappropriate behavior occurred 10 years before the Durocher hearing, and precipitated the competency hearing at which he was found competent.

court directed the trial to proceed. Id. Under these circumstances, the Circuit Court concluded that Defendant should have had a competency hearing. Id. at 930. The court specifically noted that under its own precedent, in nearly every case where the denial of a competency hearing had been upheld, "'there was some form of psychiatric evidence'" that indicated to the court "'the absence of mental illness.'" Id. (quoting Harkins v. Wyrick, 522 F.2d 1308, 1311 (8th Cir. 1977)). Here, nine mental health professionals, including the director of University of Florida's forensic psychiatric division, all concluded before the Durocher hearing that Defendant was competent. An evidentiary hearing was held during trial, and the court concluded Defendant was competent. Thus unlike in Griffin, but more like Harkins, there was ample basis to have forgone a hearing. In view of the foregoing, Counsel's postulation that a competency hearing was required is simply without merit.

Nevertheless, despite her own expressed lack of doubt as to Defendant's competence, the trial judge, in abundance of caution, had Defendant examined by yet a tenth expert, who also concluded that Defendant was competent. With that opinion, combined with the court's own observations that Defendant appeared intelligent and

aware of what was going on, the court concluded he was competent. (1996 T. 34). This fully complied with Durocher. See also, Pardo v. State, 563 So. 2d 77, 79 (Fla. 1990)(no need for separate competency hearing where experts previously concluded defendant was competent). Moreover, Counsel presents no authority that can be reasonably read as requiring more than that which the trial court did below. Counsel certainly did not in any way suggest to the trial court that he felt its procedures were inadequate. See, Watts v. Singletary, 87 F.3d 1282, 1288 (11th Cir. 1996)(defense counsel's failure to raise issue at trial level was indicative of the lack of necessity for further competency proceedings); United States v. Garrett, 903 F.2d 1105, 1117 (7th Cir. 1990)(same); Cf., Griffin (counsel consistently objected to the procedure followed by the trial court).

In assessing competency, the question is whether the defendant had a sufficient reasonable degree of rational understanding of the proceedings. Muhammad v. State, 494 So. 2d 969, 972 (Fla. 1986); Carter v. State, 576 So. 2d 1291, 1292 (Fla. 1989)("The only standard for determining competency to stand trial is whether [the defendant] understood the charges against him and whether he could assist in his defense"). Where the trial court had the opportunity

to observe the defendant's behavior, to review documents written by the defendant, and review the proffer of expert evidence, the trial court's finding of competency will not be disturbed, absent evidence which "dispositively demonstrates" incompetence. Muhammad, 494 So. 2d at 973. Here, based upon the reports of ten experts, as well as its own observations, the trial court reasonable concluded that Defendant was competent. Counsel at no point below challenged that conclusion beyond his assertion that Defendant's requests were contradictory. Nor does he now present evidence which "dispositively demonstrates" that Defendant was not competent. The trial court's conclusions should be upheld. Carter; Muhammad; Watts v. State, 593 So. 2d 198, 201 (Fla. 1992)(upholding finding of competency as not abuse of discretion; noting that counsel never challenged qualifications of experts below).

The cited reports of Drs. Whyte and Herrera fail to meet Counsel's burden of dispositively demonstrating incompetence. First of all, at no time during the proceedings below did Counsel call them to the attention of the trial court. See, United States v. O'Neal, 969 F.2d 512, 514 (7th Cir. 1992)(no error in finding defendant competent based on expert opinion where defense counsel

did not present any evidence to the contrary). Moreover, these reports, particularly given the ten disinterested expert opinions to the contrary, are highly suspect. They alone of the opinions in the record were the product of experts hired by Defendant's post-conviction counsel. See, Card v. State, 497 So. 2d 1169, 1175 (Fla. 1986)("we view reports of psychologists filed [in post-conviction proceedings] with great suspicion, particularly in a case such as this when three experts have previously determined that the defendant was competent"); Henderson v. Dugger, 522 So. 2d 835, 837 (Fla. 1988)("subsequent diagnosis made by a defense-hired expert five years after his conviction, that [defendant] may not have been competent" not sufficient to overcome trial court's well-founded conclusions to the contrary).

Further, their analysis of Defendant's competence in no way addresses the specific criteria for competence set forth in the Rules of Criminal Procedure. Rather, their conclusion that Defendant was incompetent at the time of trial is based largely upon their belief that Defendant was administered Thorazine on a daily basis at the time of trial.[18] That belief is not supported

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[18] But see, Medina, 59 F.3d at 1107 (fact that defendant had been treated with antipsychotic drugs did not per se render him

by any record evidence beyond the affidavit (also not brought to the trial court's attention) of an inmate who was also in the Dade County Jail in 1986. Moreover, there has been no suggestion, whatsoever, that Defendant was being administered any psychotropic medications at the time of the 1996 proceedings. Indeed, Dr. Greer, who reviewed Defendant's prison medical records did not observe that Defendant was on any medication at the time.

Further, these doctor's conclusion that Defendant suffered from various mental disorders (contrary to the findings of the other, non-partisan, experts) is not in itself relevant to the question of whether Defendant was competent. Muhammad, 494 So. 2d at 973("one need not be mentally healthy to be competent"); Coleman v. Saffle, 912 F.2d 1217, 1226 (10th Cir. 1990)(no competency hearing was required despite evidence of previous hospitalization and mental illness where experts opined defendant was competent); United States v. Pryor, 960 F.2d 1, 2 (1st Cir. 1992)(not determinative that defendant had drug problems and psychiatric treatment in the past); Medina, 59 F.3d at 1107 (not every manifestation of mental illness demonstrates incompetence;

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incompetent).

evidence must indicate present inability to understand the charges to support finding of incompetence). Both Dr. Whyte and Dr. Herrera further based their belief that Defendant was incompetent upon Defendant's allegedly inappropriate courtroom behavior and disregard of counsel's advice. However, these factors, without more, also do not raise questions sufficient to raise questions of mental competency. Agan, 503 So. 2d at 1256. Neither doctor persuasively relates just how these alleged problems prevent Defendant from being able to knowing and intelligently waive the right to counsel.

Finally, Counsel's contention that all ten (!) of the previous examinations was inadequate, in addition to being difficult to believe, is wholly beside the point, in view of the abundant evidence of Defendant's competence. See, Carter, 576 So. 2d at 1292 (rejecting allegations that examining experts were "incompetent" or "unprofessional" in light of ample evidence of defendant's ability to understand the proceedings). In view of the foregoing, the trial court properly concluded that Defendant was competent.

Counsel does not appear to directly attack the sufficiency of

the Durocher hearing beyond Defendant's competency. The record nevertheless supports the trial court's actions. The trial court went through Defendant's age, educational, and employment history. (1996 T. 35-36). The court inquired whether Defendant understood what the consequences of the court granting his motion would be, and Defendant replied that he would be "free in the hands of the Governor." (1996 T. 37). The court asked him to explain that statement and Defendant responded:

> THE DEFENDANT: Upon finishing the judicial process, I am free for the Governor to comply with his duty and his obligation to carry out my conviction.

(1996 T. 38). The court then asked if Defendant understood that if he prevailed on the penalty-phase claims on which the court had ordered an evidentiary hearing, that he would then be entitled to a new sentencing hearing. (1996 T. 38). Defendant replied that he understood that. Defendant also stated that the court was correct in understanding that he wanted to withdraw the R. 3.850 motion. The court explained that if Defendant withdrew his motion, that he would then not have any right to appeal to the federal courts or to appeal to this court, and that his appeals as to this case would be over. Defendant stated that he understood. (1996 T. 39). Defendant also stated that he wished to have the attorneys leave

him alone and have the right to die in peace. (1996 T. 40). Defendant was also informed that if he withdrew his motion he would not be permitted to reinstate it in the future. (1996 T. 41). Defendant stated that he understood that "perfectly," and that that was his desire. (1996 T. 42). At the end of the hearing the court again asked Defendant what he wished to do, and Defendant stated that he wished to represent himself and withdraw his R. 3.850 motion, asserting that he was competent to make his own decisions. The court found that that was an unequivocal request to represent himself, that he understood the consequences of waiving the right to counsel, that he was competent to do so, and that he also understood the effect of withdrawing the post-conviction motion, and of waiving any further right to appeal. It therefore granted his motion to discharge counsel and to dismiss the R. 3.850 motion. (1996 T. 56-57). This inquiry was more than adequate under Durocher.

Finally, to the extent that Counsel's assertion that Defendant allegedly did not understand the contents of his post-conviction motion and did not feel competent to represent himself, (B. 26), is an attack on the validity of the court's conclusion, it is without merit. First, regardless of whether Defendant's statements support

the contention that he did not feel competent to represent himself, such a factor is of no relevance in the inquiry. Hill v. State, 688 So. 2d 901, 905 (Fla. 1996)("'the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself'")(quoting Godinez v. Moran, 509 U.S. 389, 399 (1993)(emphasis the Court's)). As to the remaining claim, although Counsel does not provide a cite in support of the contention, the State questions whether such knowledge would relevant in any event. The issue necessary for Defendant to understand was the consequence of dismissing the motion -- that he would be depriving himself of further recourse to set aside his sentence, most likely resulting in his execution. That fact was discussed at length, and indeed was Defendant's repeated stated desire. As such, regardless of whether Defendant understood all the precise legal issues presented in that 257-page document he clearly understood the consequences of the granting of his motion to discharge counsel and dismiss his post-conviction motion. That is all the law requires. Durocher.

In view of the foregoing, the trial court properly concluded that Defendant was competent, and that his waiver of collateral

counsel and appeals was knowing, intelligent, and voluntary. The orders of the trial court should be affirmed.

CONCLUSION

For the foregoing reasons, the orders of the trial court relieving Mr. Bowen as counsel and dismissing Defendant's Fla. R. Crim. P. 3.850 motion should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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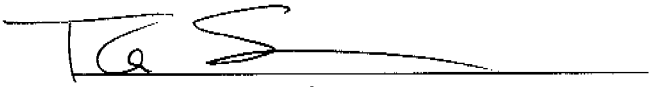

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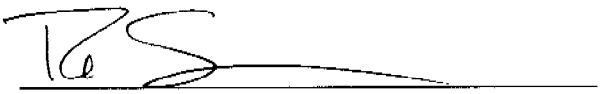
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **MICHAEL A. BOWEN,** 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5367, this 14th day of July, 1997.



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